

## 1 UNITED STATES DISTRICT COURT

## 2 DISTRICT OF MINNESOTA

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4 )  
5 In Re: Bair Hugger Forced Air ) File No. 15-MD-2666  
6 Warming Devices Products ) (JNE/FLN)  
7 Liability Litigation )  
8 ) April 20, 2017  
9 ) Minneapolis, Minnesota  
10 ) Courtroom 12W  
11 ) 9:45 a.m.  
12 )  
13 )  
14 -----

10 BEFORE THE HONORABLE JOAN N. ERICKSEN  
11 UNITED STATES DISTRICT COURT JUDGE

12 THE HONORABLE FRANKLIN L. NOEL  
13 UNITED STATES MAGISTRATE JUDGE

14 THE HONORABLE WILLIAM H. LEARY, III  
15 RAMSEY COUNTY DISTRICT COURT JUDGE

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P R O C E E D I N G S

(9:45 a.m.)

THE COURT: Good morning. Welcome, and please be seated. Please be seated. Nice to see everybody. I need to get my glasses on so I can say that with greater authority.

MAGISTRATE JUDGE NOEL: I see them all just fine.

THE COURT: Do we have our telephone participants? Would someone on the telephone say something so that we know you're there? Would someone on the telephone say something so that we know you can hear us?

UNIDENTIFIED VOICE: Good morning.

THE COURT: Good morning.

MAGISTRATE JUDGE NOEL: Thank you, good morning.

THE COURT: Should we just dive right into the joint matters?

MR. BEN GORDON: Yes, Your Honor.

THE COURT: Pretrial orders, nothing there. Now, on the plaintiff fact sheets, we've got -- we have some information. Does anyone want to say anything in addition to what is contained in the agenda?

MR. BEN GORDON: Yes, Your Honor, if I may. Ben Gordon for the plaintiffs.

THE COURT: Come on up.

MR. GORDON: Sure. Mr. Hulse and I had a very

1 fruitful colloquy about this issue, and we made significant  
2 strides. What I do want to say is the one big issue from  
3 our point of view, from the Plaintiffs' point of view, Your  
4 Honor, is this verification issue or this re-verification  
5 issue because it affects a lot of the cases, and Mr. Hulse  
6 and I did talk about it. We're trying to work out a  
7 solution. I proposed a PTO on it to the extent the Court  
8 thinks that's necessary.

9 But the issue in a nutshell is that any MDL I've  
10 ever worked on the plaintiffs are not required to re-sign a  
11 form verifying where they've previously signed the form  
12 verifying that their answers are correct, they're not  
13 required to later re-sign that. In fact, in most MDLs, it's  
14 implicit that once the substantive information is provided  
15 and attested to, that future information is deemed already  
16 signed, and a new signing is deemed anathema that to the  
17 efficiency process of the MDL.

18 In fact, in the recent order by Judge Engelhardt  
19 in New Orleans in the Taxotere MDL, and we can provide you a  
20 copy of that. He explicitly stated that resigning would not  
21 be necessary but counsel could instead attest to the new and  
22 the supplemental information being provided. And just to  
23 give you one brief example, Your Honor.

24 The PTO14 requires that every blank, every box on  
25 the PFS be completed. And so, for example, there are times

1 when plaintiff many times gets a deficiency where they  
2 haven't provided an end date for their employment.  
3 Employment that is continuing. And so now frequently  
4 counsel does not put a date in that box because there is no  
5 applicable date. What we've agreed with the defense in  
6 those instances is to then put "NA" for "non-applicable" in  
7 that box or put a fictitious date. Typically, it's been  
8 0-0-0000, just so that there is information in the box so  
9 that an automated system doesn't kick that form out as being  
10 deficient. It's our view that in those instances there's no  
11 reason for the process to repeat itself and the plaintiff to  
12 have to re-sign those forms. Counsel ought to be able to  
13 attest to that as a nonsubstantive change and that should  
14 suffice.

15 THE COURT: What about substantive changes?

16 MR. GORDON: Yes, Your Honor. Obviously, if  
17 there's core major substantive information that is new and  
18 changed, that's a different issue, and I'm certainly willing  
19 to concede that we can talk about that and work that out.  
20 But, again, the process of a PFS is intended to make the  
21 process go smoother so the plaintiffs do not have to have  
22 the delay of sending forms back to be signed a second time.  
23 And we would hope that in those instances where the  
24 information is substantially complete, that counsel should  
25 be able to attest to that on behalf of the plaintiff.

1           Beyond that, we made great strides. Many of the  
2           cases listed on docket number 270 are no longer deficient.  
3           I think Mr. Hulse would concede that he and I had a fruitful  
4           conversation this morning, and I believe that we can narrow  
5           this list substantially, particularly if we can take the  
6           verification issue off the table, so that the cases that  
7           we're really fighting about are very few. Thank you, Your  
8           Honor.

9           THE COURT: Mr. Hulse?

10          MR. HULSE: Thank you, Your Honor. And I just  
11          also wanted to pass along that Mr. Blackwell has been stuck  
12          in New Orleans and was unable to get back this morning. I  
13          don't know if he was able to get on the phone. I know he  
14          was going to try to do that if he could.

15          THE COURT: I just heard some beeping. Jerry, is  
16          that you? Jerry, if you're there, would you make yourself  
17          known?

18          MR. HULSE: He may be in flight, Your Honor.

19          THE COURT: In what way was he stuck?

20          MR. HULSE: The proceeding that he was at went too  
21          late and then with the weather last night, he was just  
22          unable to get out on flight. So for places to be stuck, New  
23          Orleans is not the worst.

24          Your Honor, we don't see that there's anything  
25          before the Court to decide. Our basic position is that the

1 PFSS were intended to be a substitute for interrogatories, a  
2 more streamlined approach.

3 THE COURT: The Order says so.

4 MR. HULSE: And so if the plaintiffs supplement,  
5 if they amend, then the instructions provided need to be  
6 verified. Now, as I indicated here in our submission, we're  
7 willing to work with plaintiff's counsel to try to come up  
8 with a PTO that would allow for the individual plaintiffs  
9 not to have to sign again in certain instances to streamline  
10 the process. But as a blanket matter, we don't think that  
11 that's necessarily going to be appropriate. Sometimes we  
12 have an initial point of fact sheet that is really lacking a  
13 lot of information and a lot more information comes in on  
14 the amended, and we need a verification at that point. We  
15 need to know that the actual plaintiff has signed it under  
16 oath.

17 But at this point, we're working through it with  
18 Mr. Gordon and his colleagues. And I'm hopeful we can reach  
19 a resolution that we can put in front of the Court.

20 THE COURT: Okay. So you don't need or want  
21 anything right now?

22 MR. HULSE: We don't, Your Honor.

23 THE COURT: All right. We can do that.

24 MAGISTRATE JUDGE NOEL: I'm good with holding  
25 things over.

1 THE COURT: And then the other plaintiff fact  
2 sheet issues, the non-deficiency lists. They just tick  
3 along, right?

4 MR. HULSE: They do. And so, Your Honor, under  
5 the process, under PTO14, if we list cases on two successive  
6 agendas, then we then have the right to move to dismiss.  
7 That doesn't mean we necessarily will, but it's the  
8 predicate to us being able to do that.

9 THE COURT: Now, we issued, when we didn't meet in  
10 person, we, I think, made a docket entry to the effect that  
11 this would count. Do you need that in the future or can we  
12 agree that if I forget, it will still count? I mean --

13 MR. HULSE: Well, I would suggest, Your Honor,  
14 that it's sufficient. I'm confident that plaintiffs'  
15 counsel or the lead counsel, the liaison counsel, are  
16 passing along those lists to all of the plaintiffs' group,  
17 and that would seem to me to be sufficient notice that it  
18 doesn't need to go up on the website. But, you know, I  
19 would defer to Mr. Gordon's thinking on that.

20 THE COURT: We'll probably always still do it. It  
21 just makes me nervous when I think at the last minute, oh, I  
22 need to do this. But, fine --

23 MR. HULSE: It's really a question of what the  
24 Court and plaintiffs think is going to be adequate notice.  
25 If they think it's adequate notice for it not to go on the

1 website, then that's fine by us.

2 MR. BEN GORDON: Your Honor, if we're on notice of  
3 the claim then we think that's adequate.

4 THE COURT: All right. Thank you, Mr. Gordon.  
5 Did you want to say something?

6 MAGISTRATE JUDGE NOEL: I'm just wondering what  
7 the number is.

8 (Off the record discussion between Judge Ericksen  
9 and Magistrate Judge Noel.)

10 (IN OPEN COURT)

11 THE COURT: Okay. And now the bellwether  
12 selection plan, Item Number 3 on the agenda. Anyone want  
13 to.

14 MS. YOUNG: Your Honor, the defendants don't have  
15 anything additional to add to what's on the agenda.

16 THE COURT: Plaintiffs, same with you, I imagine.

17 MS. ZIMMERMAN: The only addition we have, Your  
18 Honor, is that we have served specific discovery requests in  
19 the Ramsey County cases as well at this point, and that is  
20 new since the time the agenda went in.

21 THE COURT: We should say that Judge Leary is  
22 here.

23 JUDGE LEARY: If I may Judge Ericksen, if you  
24 could, Ms. Zimmerman, with Mr. Hulse being copied, send me a  
25 letter indicating the cases, the bellwether cases including

1 the specific cases that both parties designated.

2 MS. ZIMMERMAN: Certainly.

3 JUDGE LEARY: Okay. A letter would be fine.

4 Thank you.

5 MS. ZIMMERMAN: Certainly. And I can tell you,  
6 Judge, that the three cases are a Thomas Redding.

7 JUDGE LEARY: Do you have a court file numbers?

8 MS. ZIMMERMAN: Yes. Court File Number  
9 62-CV-156848. Ronny Singsaas, and that is Court File  
10 62-CV-163555. And then the one case that was nominated by  
11 both plaintiffs and defendants is Kevin Walker, Court File  
12 62-CV-161257.

13 JUDGE LEARY: I would ask you to submit a letter.  
14 Thank you very much.

15 MS. ZIMMERMAN: Certainly.

16 THE COURT: Okay. So update on cases. Who wants  
17 to? No one? All right, well, just forget it then.

18 Ms. Zimmerman?

19 MS. ZIMMERMAN: Yes, thank you, Your Honor.

20 Just to clarify a little bit, the numbers that are  
21 provided in the joint status report, we show that as of  
22 today, there are 1565 complaints pending before this MDL,  
23 and it does include 1746 plaintiffs. The reason there are  
24 more plaintiffs than there are complaints has to do with the  
25 transfer of the Saint Louis County filings. And it is our



1 understanding that a number of the plaintiffs in those joint  
2 St. Louis filings were Minnesota residents, so it would be  
3 my expectation that there may be at some point a potential  
4 remand motions forthcoming for this Court to consider given  
5 that there won't be a lack of diversity for at least some of  
6 those plaintiffs that recently joined.

7 THE COURT: To the extent motions were filed in  
8 Missouri, those are gone, right?

9 MS. ZIMMERMAN: I believe that that's correct.

10 THE COURT: All right. The docket doesn't have a  
11 hammer on them, and I'm not planning on ruling on them.

12 MS. ZIMMERMAN: Okay.

13 THE COURT: All right. Oh, Judge Noel just  
14 corrected me. After having been a judge for 22 years, I now  
15 will start referring to that thing as a gavel not a hammer.  
16 Just so you know, here's how I've developed my language. I  
17 refer to that as a gavel. I forgot it was even over there,  
18 but I would love to have a chance to use it.

19 A hammer to me is the indication on the ECF that  
20 there's reporting. Everyone could just call that a hammer,  
21 but I'm not, I don't call that a hammer. But if that were a  
22 hammer, then I'd also get some other tools like an ax, a  
23 screwdriver. What else might be a tool?

24 MR. BEN GORDON: Vice grips.

25 THE COURT: Oh, thank you, Mr. Gordon.

1 MAGISTRATE JUDGE NOEL: I could say some people  
2 accuse magistrate judges of using axes all the time in  
3 discovery disputes.

4 THE COURT: There you go. This is too much fun.

5 MS. ZIMMERMAN: The one other update we would have  
6 on just jumping to number 5, we show that there are a total  
7 of 53 cases pending before Judge Leary in Ramsey County.

8 THE COURT: Okay.

9 MR. HULSE: Your Honors, may I ask a clarifying  
10 question about your statement on St. Louis? So is it  
11 correct then that --

12 THE COURT: Come on up.

13 MR. HULSE: Sorry.

14 THE COURT: Otherwise, Mr. Blackwell won't be able  
15 to hear you.

16 MR. HULSE: Fair enough. So those cases before  
17 they were transferred by the JPML had remand motions,  
18 actually two of them had remand motions, and then motions to  
19 dismiss pending, so do they come over to this court then  
20 without those motions?

21 THE COURT: Right.

22 MR. HULSE: All right. So if the plaintiffs  
23 counsel wanted to seek remand, they would have to then  
24 re-file in this court.

25 THE COURT: Those motions are gone.

1 MR. HULSE: All right. Thank you, Your Honor.

2 MR. BEN GORDON: If I may, Ben Gordon for the  
3 plaintiffs. Because counsel for those plaintiffs have  
4 reached out to us, it's our understanding that those motions  
5 are stayed before this court, and they would have to re-file  
6 them, but they're not under any obligation to respond to,  
7 you know, any motions by the defense in those underlying  
8 cases.

9 THE COURT: That is definitely true.

10 MR. BEN GORDON: Okay.

11 THE COURT: As to whether any future action would  
12 be by way of a filing of a new motion or a re-upping of the  
13 old one, it was my impression that what Ms. Zimmerman was  
14 saying, and I was agreeing to, is that there would be new  
15 motion practice if there are issues to be decided here, but  
16 we can consider the St. Louis motion stayed. That would be  
17 consistent with the earlier pretrial order dealing with  
18 motions that were pending in cases before the MDL was  
19 created.

20 MR. BEN GORDON: That was my understanding, Your  
21 Honor.

22 MR. HULSE: All right. That's helpful.

23 MR. BEN GORDON: Thank you, Your Honor.

24 THE COURT: Thank you. Is there anything before  
25 we get to Canada? No. And there's really nothing to say

1 about the Canadian action, I don't believe.

2 MS. YOUNG: No, Your Honor. Nothing has happened  
3 in Canada.

4 THE COURT: Additional pretrial orders, that's the  
5 re-verification issue, which we have discussed.

6 As to discovery, there are some summaries here.  
7 Does anyone want to say anything about Item Number 8 on the  
8 agenda?

9 MR. HULSE: If I can say no, Your Honor, from this  
10 place.

11 MS. ZIMMERMAN: And, Your Honor, we have a few  
12 updates, and perhaps some questions on housekeeping issues.  
13 We detail in or summarize, I guess, what our anticipated  
14 motions will be. But in addition to that, just from a  
15 housekeeping perspective, tomorrow is the deadline for  
16 filing of the punitive damages motion. I don't know if the  
17 Court has a preference. We've seen it done different ways  
18 in the District of Minnesota, whether the motion is argued  
19 to the Article III judge or to the magistrate judge. I  
20 assume that that's a preference of the Court, and so if the  
21 Court has a preference, I'm happy to work with your chambers  
22 to find a date for either or both of you to hear those.

23 THE COURT: File it and schedule a hearing in  
24 front of Judge Noel, please.

25 MS. ZIMMERMAN: Okay. And then similarly, Judge

1 Leary, you have indicated to us in hearings in the past an  
2 indication or an interest in potentially collaborating on  
3 various issues that may be crossing across both the MDL and  
4 the Ramsey County proceeding. I don't know if it would make  
5 sense to potentially hold that hearing for punitive damages  
6 together jointly or if you would like us to set a separate  
7 hearing in Ramsey County to bring a motion. We don't have a  
8 deadline in the Ramsey County cases right now for the  
9 punitive damages motion, but I don't expect that the motion  
10 itself should be dramatically different.

11 JUDGE LEARY: I think that's something we should  
12 discuss. I think all things being equal, I would like to  
13 convene one hearing with a joint jurisdiction over that  
14 hearing. But let me talk with Referee Noel and confirm with  
15 Judge Ericksen.

16 MS. ZIMMERMAN: Certainly. And we can absolutely  
17 circle back with both of your clerks if that would make more  
18 sense, but I just wanted to follow-up on that issue.

19 And one additional update on the third party  
20 subpoenas to manufacturers of patient warming products, we  
21 had provided a copy of Judge Noel's Order to counsel for  
22 both Stryker, which manufactures the mistral product and  
23 then the Cincinnati Sub-Zero. We did receive some e-mails  
24 yesterday. I understand we are setting a meet and confer  
25 with counsel for Stryker. I hope that we will be concluding

1 that in the next week. And we understand that Cincinnati  
2 Sub-Zero will be providing a response this week, and I don't  
3 know what that response, what form that will take. But  
4 that's an update from when we submitted this earlier this  
5 week.

6 THE COURT: Mr. Hulse?

7 MR. HULSE: Just briefly, Your Honor, on  
8 plaintiff's motion for punitive damages, given that I think  
9 that would be by default on the regular non-dispositive  
10 motion cycle given the, you know, it's likely to be a motion  
11 that requires more briefing. We would just propose to have  
12 a longer briefing timetable on that. And we will, of  
13 course, work with plaintiff's counsel to do that. That's  
14 all.

15 THE COURT: I'm not just going to give you more  
16 time in a blind. Nice try though.

17 MR. HULSE: Of course not, Your Honor.

18 THE COURT: More words while you're at it. More  
19 pages. An opportunity to respond even though it's  
20 non-dispositive?

21 MR. HULSE: I just want to make sure that nobody  
22 says, "well, you didn't say anything at the hearing so."  
23 Now I've said it.

24 THE COURT: Thank you. All right. Anything else  
25 on discovery Item 8 before we get to or turn our attention

1        anyway to Item Number 9?

2                Very well. Expert reports. There are some  
3        positions set out here. I gather that this is the item that  
4        caused the delay in the submission of the joint agenda. So  
5        is there anything that anyone would like to say about this?  
6        You got your positions laid out here.

7                MS. ZIMMERMAN: Yes, Your Honor, if we may.

8                As we outline in our papers, the plaintiffs  
9        learned late in the day, well, actually I think when we were  
10       before Your Honor, Judge Noel, for a different hearing on  
11       the 29th, and we heard reference to whether or not the  
12       defendant's expert reports were going to be due in a few  
13       months. We realized we were operating under a fundamentally  
14       different understanding of what the due dates were.

15               Looking back at some of the transcript testimony  
16       that was cited by defense counsel, it seems that the Court  
17       does talk about an initial report being an expert report for  
18       any party that has the burden of proof. And I would say  
19       that typically in my experience and also looking at the  
20       rules and the manual for complex litigation and some of the  
21       best practices memos out there, there tend to be two  
22       different approaches to how to do expert discovery.  
23       Typically, under the rules, I think there's an initial  
24       report from the party that bears the burden, typically, the  
25       plaintiffs. There's a responsive report from the

1 defendants, and then there's a rebuttal report from the  
2 plaintiffs, which is what was proposed by defense counsel,  
3 as Your Honors were considering what kind of a scheduling  
4 order to adopt in this particular matter.

5 The other way that is sometimes done, and I think  
6 it's done particularly in patent cases and some other  
7 complex cases, is there's a mutual exchange of initial  
8 reports, and then there's a mutual exchange of rebuttal  
9 reports. And we thought that we were operating under the  
10 second, based on the claim language of the order.

11 Understanding now that we have a difference of  
12 opinion on what was appropriate, we suggested to defense  
13 counsel that what we ought to perhaps do is stipulate to an  
14 amendment to the scheduling order or suggest an amendment to  
15 Your Honors where we have now disclosed our experts and that  
16 they could disclose their experts as a response, and then  
17 pursuant to the standard practice, we would have the  
18 opportunity to do a rebuttal at some point shortly  
19 thereafter.

20 The other issue has really to do with defendant's  
21 request to depose our experts prior to disclosing their  
22 experts, and that very issue was brought up in front of this  
23 Court, and Judge Noel asked some questions about that, and  
24 indicated that in his experience, that's not what's ever  
25 done. That defendants are not typically afforded the



1 opportunity to depose the plaintiffs' experts prior to  
2 disclosing their own expert reports. So we certainly think  
3 that that is appropriate and that the Court has already  
4 spoken to that issue. And we think that the expert  
5 deposition should really be placed after the conclusion of  
6 the written reports are produced.

7 So with respect to the reports, we would request  
8 the opportunity to do a rebuttal after the disclosure of the  
9 experts from the defendants. And if the Court is not  
10 inclined to allow us to do that, we would like to have full  
11 briefing on the issue as to the scope and context of the  
12 rebuttal reports defendants are able to produce.

13 MR. COREY GORDON: Good morning, Your Honors.  
14 Corey Gordon for the record. There are really two issues  
15 here.

16 THE COURT: Ben's brother?

17 MR. GORDON: We are no relation, but he is younger  
18 and better looking than I am, so if you want a way of  
19 distinguishing us, that would be the easiest.

20 MR. BEN GORDON: Why aren't you nicer to me then?

21 (Laughter.)

22 MR. COREY GORDON: What?

23 MR. BEN GORDON: Why aren't you nicer to me then?

24 MR. COREY GORDON: I'm very nice to you,  
25 Mr. Gordon.

1           There are really two issues. Number one is what  
2       plaintiffs are really seeking is the opportunity to submit a  
3       surrebuttal. The scheduling order is very clear. It called  
4       for an initial disclosure. And as the Court had explained  
5       in the hearing where the transcript quoted that, that was  
6       the initial report for whoever has the burden of proof on an  
7       issue. So those who had the burden of proof on the issues  
8       that they wanted to submit expert testimony on did so, and  
9       those who want to rebut those reports have an opportunity to  
10      do so coming up shortly here at the end of in May.

11           What they're asking for is not a rebuttal, an  
12      opportunity to rebut our rebuttal. They're asking for a  
13      surrebuttal. It is true there are scheduling orders I've  
14      seen sometimes that actually quite frequently that have  
15      contemplated the opportunity to do a surrebuttal. This  
16      scheduling order did not. And so if they want to amend,  
17      seek to amend the scheduling order, there's a formal way to  
18      do that, and I think they need to do that. And given the  
19      time frame, I would submit that that is really would be very  
20      problematic and can throw things off, and it's really quite  
21      unnecessary.

22           As for the other issue, the timing of depositions,  
23      what we're dealing with here is the need to, frankly, a very  
24      significant logistical issue. They've declared seven  
25      experts, and I'll talk about that in a second. We

1 anticipate declaring a comparable number, perhaps a couple  
2 more, but we're dealing with a significant number of  
3 experts. If we wait until some time after June 2nd to start  
4 scheduling 14, 15, 16 experts and get them done before  
5 August 2nd with a July 4th holiday thrown in there, I don't  
6 think it's going to happen.

7 The difficulties in scheduling so much as a single  
8 deposition of experts, most of whom have busy lives, and in  
9 some cases they are treating patients or doing other,  
10 engaged in other professional activities that occupy their  
11 time. It's really hard to schedule expert depositions. I  
12 mean I've been doing this for 37 years, and you don't just  
13 pick up a phone and say, you know, let's schedule a dozen  
14 experts over the next 30 days, and, you know, all the pieces  
15 fall into place.

16 So as soon as we got their expert reports, we  
17 said, please, give us some, start getting us some deposition  
18 dates. We know it's going to take a while. Well, they've  
19 kind of filibustered us, if you will, and we're now at, you  
20 know, April 20th. We haven't gotten any dates. They're  
21 saying no, no, we're not even going to give you any dates.  
22 We shouldn't have to give you any dates until after we see  
23 your expert reports. That's really going to throw a monkey  
24 wrench in the system. And it's not what either the  
25 scheduling order or the rules contemplate.

1           The scheduling order does not, as I read it, and  
2           as I understand the Court's comments on it, it doesn't  
3           preclude the taking of expert depositions prior to the  
4           disclosure of both parties.

5           MAGISTRATE JUDGE NOEL: But it doesn't make any  
6           sense to do that, does it? I mean the whole point is, as I  
7           understand the 91 amendments to the rules that generated  
8           this whole thing about expert reports, is everybody is  
9           supposed to have a piece of paper or multiple pieces of  
10          paper with what the expert is going to say, so that when we  
11          do the depositions everybody has got the same data to start  
12          with. If you have a situation where you start deposing  
13          plaintiffs' experts on their reports before your guys even  
14          prepare a report, that kind of screws up the whole system,  
15          doesn't it?

16          MR. COREY GORDON: With all due respect, I guess I  
17          don't -- that's not my understanding of the rules, but I  
18          certainly recognize you have more experience than I do.

19          THE COURT: Are you just saying that you want to  
20          get them scheduled?

21          MR. COREY GORDON: Yes.

22          THE COURT: Okay. So here's what I --

23          MAGISTRATE JUDGE NOEL: But scheduled after your  
24          June 2nd date?

25          THE COURT: Or It might be before, but let me just

1 tell you what --

2 MR. COREY GORDON: It would probably be both.

3 THE COURT: Let me tell you what I think.

4 Rule 26(b)(2)(a) uses the term "rebuttal" in a way that's  
5 different from rebuttal, like a rebuttal expert at trial or  
6 something. And it is entirely consistent with the way that  
7 Judge Noel used those terms in the transcript that's  
8 contained in the order. So burden of proof party, experts  
9 are the initial experts, and the party responding to the  
10 party with the burden of proof submits what's known as  
11 rebuttal. That's what is called for in the rules. That's  
12 what's contemplated in our pretrial order, and so there's  
13 not really confusion about that.

14 The question about depositions before the rebuttal  
15 expert is something that's slightly different. Mr. Gordon,  
16 what I think you're saying is that you can't get these  
17 scheduled, but you're not asking for an order that says you  
18 don't -- that you have a right to take the plaintiffs'  
19 experts' depositions before you submit your expert report,  
20 so your experts are not going to be responding. Well, they  
21 probably couldn't really at this point anyway to deposition  
22 information from the plaintiffs' experts. Because that, I  
23 don't think -- I think that could be problematic because if  
24 you are entitled to have their expert reports before you  
25 take their depositions, it's never going to end because

1       they're going to depose on you, and then if you get to  
2       submit written reports based on deposition information, then  
3       they'll almost automatically have a right to submit  
4       supplemental written reports after your depositions, and I  
5       don't see how that is good for anyone.

6               MR. COREY GORDON: And I want to make clear, I  
7       don't think -- it's not our position that we have an  
8       absolute right to take their expert depositions prior to our  
9       disclosure. I believe that issue was actually discussed  
10      with the Court and --

11             THE COURT: I think we did talk about that. I  
12      don't remember exactly what we --

13             MR. COREY GORDON: I mean that was not  
14      incorporated in the scheduling order, but neither was the  
15      flip side of that a preclusion of taking their experts  
16      before we disclosed our experts. And as I read the rules, I  
17      can't even get to it. It's 26 -- well, the trial  
18      preparation expert's part, deposition of an expert who may  
19      testify. A party may depose any person who has been  
20      identified as an expert whose opinions may be presented at  
21      trial. If Rule 26(a)(2)(b) requires a report from the  
22      expert, the deposition may be conducted only after the  
23      report is provided.

24             So as I read the rules, it's a limitation on you  
25      can't take the expert before their report, but I don't read

1 any limitation on once the report is submitted that --

2 MAGISTRATE JUDGE NOEL: Do we understand you now  
3 to be saying that you do not intend and you're not asking  
4 for the right or just whatever you want to call it, you're  
5 not asking to depose any of the plaintiffs' experts before  
6 your reports are due? You're just asking to get dates on  
7 the calendar for some later dates after your reports are  
8 disclosed? Is that what you're asking? Or are you asking  
9 to depose them right now or as soon as you can without  
10 regard to whether your reports are done?

11 MR. COREY GORDON: I think the latter, as soon as  
12 we can get them scheduled. Just the process of scheduling  
13 expert depositions, particularly with these experts are, you  
14 know, from coast to coast.

15 THE COURT: Okay. So listen, if it's really a  
16 scheduling issue, then we can decide particular scheduling  
17 issues. So you know whose deposition you want to take. I  
18 would say that the plaintiffs would not be within their  
19 right to say they're not going to give you a date now  
20 because it's not until June 2nd. You have to wait until  
21 after June 2nd to start calling them and scheduling it.  
22 That does not strike me as being reasonable.

23 If the scheduling process now results in undue  
24 delays of these depositions in an after June 2nd world, and  
25 there's an expert who would be available on May 30th

1       instead, well, if it's either May 30th or, you know, a year  
2       hence, then we can talk about that person maybe should be  
3       May 30th. But if you're not saying that you have a right to  
4       a pre -- you're not deliberately trying to get people  
5       scheduled -- well, I don't think you should try to  
6       deliberately get their experts scheduled before your expert  
7       reports are due.

8               Plaintiffs should not take the position that  
9       you're not going to schedule these until, and I don't know  
10      what positions have or haven't been taken. But just, but so  
11      that's my view is that you're not going to get an order  
12      saying that you're entitled to take the depositions now come  
13      hell or high water. But I do think that since at least some  
14      of the total experts are known, that you all should try to  
15      get those depositions on the calendar as soon as possible.  
16      And if it turns out that they're not going to be able to be  
17      timely deposed after, then we can talk about whether there's  
18      some magic prohibition against taking the deposition ahead  
19      of time in some, if there's a fact specific reason to  
20      proceed that way.

21             MR. COREY GORDON: And just to clarify, Your  
22      Honor, it's already April 20th. When we started this  
23      process in the beginning of April, we thought, okay, well,  
24      you know, did the usual back and forth. They'll contact  
25      their experts, get a few available dates, match them up with



1       their calendars and say, okay, here's when we could make  
2       them. We'd look at our calendars. We'd say, okay, let's do  
3       so-and-so on such-and-such a date, so-and-so on  
4       such-and-such a date. That didn't happen. They dug their  
5       heels in saying no, we're not even going to give you dates  
6       until after June 2nd.

7               MR. BEN GORDON: No, Your Honor, that's not  
8       correct.

9               THE COURT: I know, I know, here just -- it's  
10      okay. It's okay.

11              MR. COREY GORDON: And I just want to say the  
12      problem with not deposing their experts until after  
13      June 2nd, is, A, a logistical problem, which is a very  
14      serious logistical problem; but, B, the opportunity for us  
15      to understand the alpha & omega of each expert's report,  
16      and, therefore, what we need to do to rebut that. That's  
17      partly the, you know, the value of a deposition.

18              And I just want to, I point out when this whole  
19      issue was discussed back in September, Mr. Ben Gordon told  
20      the Court, you know, they're going to know what those  
21      witnesses will say. They were here at science day. They  
22      have the experts.

23              That's not true. They presented three experts at  
24      science day. They deep sixed two of them, so one of their  
25      seven experts was actually at science day. They had

1 disclosed, I don't know, like six or seven experts in the  
2 Walton and Johnson case. They got rid of all but one of  
3 them. So of the seven experts they've disclosed, we had  
4 some foreshadowing of two of them. The other five are brand  
5 new. One of them, you know, purported to do his own study.  
6 There's a lot of information that's new to us.

7 MAGISTRATE JUDGE NOEL: But you have reports from  
8 each of them now, correct?

9 MR. COREY GORDON: We do. And, you know, I --

10 THE COURT: That's what you're going to have.

11 MR. COREY GORDON: Right. But my point is, aside  
12 from the logistical issue, the idea that if, well, if we  
13 could schedule expert X on May 10th and learn from that  
14 deposition that, well, actually what appears in their report  
15 isn't, you know, completely, you know, it wasn't necessarily  
16 clear or was incomplete, and now we have a complete  
17 understanding and that causes us to rethink how we might  
18 want -- what the type of expert we might want to use to  
19 rebut it or what our expert --

20 MAGISTRATE JUDGE NOEL: Just to followup on what  
21 Judge Ericksen said, if that's the approach the Court were  
22 to take, then necessarily because your report is going to be  
23 based on not only the plaintiffs' expert's report but also  
24 in their deposition, and you're going to incorporate new  
25 things into your report that they didn't think about,

1       they're going to ask for an opportunity for a surrebuttal  
2       rebuttal report, and that's going to screw up -- technical  
3       legal term -- the logistics worse than what you're talking  
4       about in the first place, isn't it?

5               THE COURT: Well, you don't have to answer that.  
6       Here, I'll just say that now that I understand what you're  
7       saying, I can see where the plaintiffs would have had the  
8       belief that you wanted their information before you  
9       submitted your expert reports. You're not entitled. I'm  
10      just saying you're not entitled to that. I hear you that it  
11      would be helpful for your experts. You're not going to get  
12      that order from me right now. In fact, I would say to the  
13      contrary.

14             To the extent that your concerns are purely  
15      logistical, plaintiffs will work with you on that, and I  
16      will use my powers to make sure that there aren't  
17      unreasonable logistical hurdles. But, and I think that the  
18      logistical hurdles will be easier to overcome now that we've  
19      straightened out the information gathering part of it. You  
20      separate that out and go forth and get these depositions  
21      scheduled.

22             MR. COREY GORDON: I just want to make sure I  
23      understand what the Court is saying. If so beginning the  
24      scheduling process could mean they're not even looking for  
25      dates before June 2nd.

1 THE COURT: Right.

2 MR. COREY GORDON: Then we're going to run into  
3 the same situation of having to do, you know, 15, 16, 17  
4 depositions in functionally, you know, less than 60 days.

5 MAGISTRATE JUDGE NOEL: That doesn't strike me as  
6 being a challenge.

7 THE COURT: But, see, if you approach it purely as  
8 a logistical matter, that's one thing, but it's clear that  
9 that's not really the only thing that was in your mind. You  
10 know, the other thing that's in your mind is the information  
11 gathering, so --

12 MR. COREY GORDON: Well, the whole point of taking  
13 the deposition is information gathering.

14 THE COURT: Information gathering so that your  
15 experts have the deposition testimony before they submit  
16 their expert reports just to make it clear.

17 MR. COREY GORDON: And that's what I wanted to  
18 make clear, Your Honor. If a deposition were to be  
19 scheduled prior to our expert disclosure, it could, I mean  
20 perhaps this is what you're saying, but I'm not sure of that  
21 is we can't -- we have to act as if we didn't know that  
22 information.

23 THE COURT: No, the discussion doesn't have to go  
24 any further.

25 MR. COREY GORDON: Okay.

1 THE COURT: I think you should expect that they  
2 will -- that the plaintiffs' experts will be deposable  
3 shortly after June 2nd.

4 MS. ZIMMERMAN: We're happy to do that, Your  
5 Honor.

6 MR. COREY GORDON: Okay. Thank you, Your Honor.

7 THE COURT: Judge Leary?

8 JUDGE LEARY: If I could add one thing. Not only  
9 does Judge Ericksen's ruling make sense, but in terms of the  
10 defense's own experts, I think it behooves both sides to  
11 start, I know you don't have an obligation to disclose your  
12 experts, and you haven't disclosed your reports yet, but I  
13 think you need to be in touch with your experts to determine  
14 their availability ongoing and not wait until the plaintiffs  
15 ask for those dates. I think once you have dates for the  
16 depositions of plaintiffs' experts, then I think you can do  
17 your due diligence on the defense experts as well,  
18 particularly times and issues. Thank you.

19 MR. COREY GORDON: Thank you.

20 THE COURT: Mr. Gordon, does that take care of  
21 your heart attack or are you --

22 MR. BEN GORDON: It does, Your Honor. My only  
23 concern was that, you hit the nail on the head, they asked  
24 specifically that they connected with --

25 THE COURT: Now, that we have it, there's no

1 point --

2 MR. BEN GORDON: Yes, Your Honor. Thank you, Your  
3 Honor.

4 THE COURT: -- in rubbing salt in the wound.

5 MR. BEN GORDON: Understood, Your Honor.

6 THE COURT: Much as I know you'd love doing it to  
7 my wound.

8 MR. BEN GORDON: No, Your Honor. Thank you.

9 THE COURT: Okay. The last item? That was. That  
10 was it. All right. Mr. Gordon?

11 MR. BEN GORDON: Your Honor, I just want to say if  
12 we're done with the substantive business, I have a conflict  
13 the next hearing date, which we have plenty of ample help  
14 here. I don't want to put things off, but I'll be in Spain  
15 and Portugal as it happens on those dates, so I was going to  
16 be asked to be excused from the May 18th status conference.

17 THE COURT: Let's take a look at May 18th and see.  
18 Well, why don't you folks come back? I'm reluctant to put  
19 all of these scheduling matters on the record.

20 MR. BEN GORDON: We'll have plenty of coverage,  
21 Your Honor. I just wanted to make sure you understood I  
22 wouldn't be here. Thank you.

23 THE COURT: Right, right, but would you come back  
24 to chambers so that we can work on --

25 MR. BEN GORDON: Oh, come back. I thought you

1 meant come back in May.

2 (Laughter.)

3 THE COURT: No. Boy, you know, you're getting to  
4 me know me pretty well.

5 Thank you, attorneys, who are on the phone. We  
6 are in recess.

7 (Court adjourned at 10:27 a.m.)

8

9 \* \* \*

10 REPORTER'S CERTIFICATE

11 I, Maria V. Weinbeck, certify that the foregoing is  
12 a correct transcript from the record of proceedings in the  
13 above-entitled matter.

14

15 Certified by: s/ Maria V. Weinbeck

16 Maria V. Weinbeck, RMR-FCRR

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